

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CPCI,

Plaintiff,

v.

TECHNICAL TRANSPORTATION, INC.,

Defendant.

Case No. C04-1519L

ORDER REGARDING
DEFENDANT'S MOTION *IN LIMINE*

I. INTRODUCTION

This matter comes before the Court on a motion *in limine* filed by defendant Technical Transportation, Inc. ("Tech Trans"). (Dkt. #35). Tech Trans seeks an order (1) excluding all reports issued by third-party "deinstallers" regarding the condition of the plasma televisions before their tender to Tech Trans, as well as any hearsay comments from the deinstallers, (2) ordering that the jury be instructed as to a spoliation inference regarding the destruction of the sets, and (3) excluding statements made by the truck drivers. For the reasons set forth below, the Court grants in part and denies in part the motion *in limine*.

The Court also notes that the findings and conclusions in this order, like all rulings *in limine*, are preliminary and can be revisited at trial based on the facts and evidence as they are actually presented. See, e.g., Luce v. United States, 469 U.S. 38, 41 (1984) (explaining that a

1 ruling *in limine* “is subject to change when the case unfolds, particularly if the actual testimony
2 differs from what was contained in the proffer. Indeed even if nothing unexpected happens at
3 trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in*
4 *limine* ruling.”). Subject to these principles, the Court issues this ruling for the guidance of the
5 parties.

6 **II. DISCUSSION**

7 In December 2001, Impart, Inc. (“Impart”) purchased approximately 184 used plasma
8 screen television sets from NEC. Impart contracted with Digitron Communications, Inc.
9 (“Digitron”) to de-install the sets from various locations across the country and transport them to
10 Impart’s facility in Seattle. Digitron subcontracted the transportation of the sets to Tech Trans, a
11 certified and registered surface forwarder of freight. Impart subsequently determined that 63 of
12 the sets arrived with latent transit damage. Impart did not attempt to sell the sets and determined
13 that they were a total constructive loss.

14 Digitron insured the sets on Impart’s behalf for \$2,800 with The Hartford Insurance
15 Company, which is subrogated to Digitron’s rights regarding the claim at issue; plaintiff CPCI is
16 the assignee of The Hartford’s claims regarding the loss.

17 **A. The Deinstallers’ Records.**

18 Digitron subcontracted with various third parties to deinstall the sets from various
19 locations. Digitron provided the deinstallers with a form work order on which they could make
20 notations to confirm that the sets were “functioning properly.” Tech Trans seeks to exclude the
21 completed forms on the grounds that they contain hearsay; CPCI argues that they are subject to
22 the business records exception to the hearsay rule. The business records exception applies if a
23 record is “made at or near the time by, or from information transmitted by, a person with
24 knowledge, if kept in the course of a regularly conducted business activity, and if it was the
25 regular practice of that business activity to make the . . . [record], all as shown by the testimony
26 of the custodian or other qualified witness” Fed. R. Evid. 803(6). First, Tech Trans argues
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1 that the forms were not generated pursuant to Digitron's regular business practice because this
2 project was their first with deinstalling plasmas and working with some of the subcontractors.
3 Digitron, however, is in the business of subcontracting with audio-visual technicians to
4 accomplish its electronics services as it did here.

5 Second, Tech Trans argues that there is no evidence that the reports were made in the
6 regular course of the deinstallers' business. However, the deinstallers were technicians from
7 various audio-visual companies. They were instructed to complete a form for each set and they
8 did so. There is no evidence that the forms were created for purposes of litigation, which would
9 undermine their reliability. Third, Tech Trans contends that plaintiff has not offered the
10 testimony of the records custodian or other qualified witness who can testify as to the methods
11 of keeping the information. Digitron's project manager has described how the information was
12 gathered and maintained and presumably will do so at trial. Although Tech Trans argues that
13 her knowledge of the project is limited, it is sufficient to satisfy the requirements of the rule, and
14 the weight of the records and her testimony can be determined at trial. The Court also finds that
15 the subcontractors who made their entries on the forms were "authorized" persons and rejects
16 Tech Trans' objection to the records on that basis.¹

17 Accordingly, the Court finds that the forms are business records under the exception to
18 the hearsay rule, and the forms and any recitation of facts therein are admissible. However,
19 because the forms were not submitted to the Court for review, the Court makes no ruling
20 regarding the admissibility of other statements in the forms. Tech Trans may renew its objection
21 at trial if the forms contain additional elements of hearsay, opinion testimony, or otherwise

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23 ¹ See, e.g., United States v. Pitman, 475 F.2d 1335, 1337 (9th Cir. 1973) (explaining that
24 an entry on a form is admissible if it is "made by an authorized person, to record information
25 known to him or supplied by another authorized person"). As in Pitman, the subcontractor
26 technicians in this case were an "integral part" of Digitron's business, and were therefore
27 authorized persons rather than outsiders. Id.; see also Saggu Dep. at p. 20 (describing length of
Digitron's relationship with the subcontractors, which ranged from two years to "ten years
plus").

1 inadmissible material.

2 **B. Spoliation Inference.**

3 After Impart determined that the television sets had been damaged in transit, Digitron
4 submitted a claim on its behalf to its insurer, The Hartford, which subsequently paid the claim in
5 full. The Hartford then directed its independent adjuster to sell the television sets at salvage.
6 The Court, in its discretion, may sanction a party who destroyed evidence by instructing the jury
7 that it may infer that the evidence would have been unfavorable to the responsible party. See,
8 e.g., Medical Lab. Mgmt. Consultants v. Am. Broadcasting Cos., 306 F.3d 806, 824 (9th Cir.
9 2002). Tech Trans argues that such an instruction is warranted in this case because it never had
10 the opportunity to inspect the sets.

11 The issue of whether a spoliation instruction is warranted is a close call in this case. On
12 the one hand, Tech Trans was never warned that The Hartford was going to destroy the sets, and
13 it has had no opportunity to inspect them after CPCI filed suit. The Hartford's claim
14 representative knew he should retain the sets for at least some period of time to "back up [its]
15 subrogation claim against Tech Trans." Lovlien Dep. (Dkt. #35) at p. 52. On the other hand,
16 the standard in the industry is to retain the damaged property in its original condition "until the
17 carrier has had an opportunity to inspect it."² Tech Trans had that opportunity after the claim
18 was filed but declined to do so. Batcha Dep. (Dkt. #33-3) at p. 78 (explaining that Tech Trans
19 did not inspect the sets because they had "no intention" of paying the claim). Although Tech
20 Trans argues that it did not know that The Hartford intended to pursue litigation and if it had, it
21 would have inspected the sets, The Hartford gave Tech Trans explicit notice that it planned to
22 pursue litigation if Tech Trans continued to refuse to pay the claim. See Declaration of Cary
23 Dictor (Dkt. #33), Ex. B (letter from The Hartford to Tech Trans noting that they planned to
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25 ² See S. Sorkin, Goods in Transit, § 8.03. Although Tech Trans objects to any reliance on
26 the treatise because it does not address spoliation in the context of litigation, it is persuasive
27 authority on the issue of the industry standard.

1 seek reimbursement from Tech Trans and “pursue recovering through litigation” if necessary).
2 Although it is unclear when the sets were destroyed, it appears that it was at least a month after
3 the threatening letter was sent and about eight months after the alleged damage occurred.

4 Additional factors support declining to give a spoliation instruction. First, Tech Trans
5 believed it had sufficient information to determine fault and deny the claim without examining
6 the sets. Batcha Dep. at p. 65 (Tech Trans’ decisionmaker explaining that he reviewed the MTI
7 inspection report and information regarding how the sets were packaged). The former Impart
8 technician who worked extensively on the sets was deposed in February 2005, and that
9 deposition is an additional source of information about their condition. A spoliation inference is
10 not necessary or warranted because Tech Trans has alternate, though perhaps somewhat less
11 reliable, sources from which to determine fault. See, e.g., Medical Lab. Mgmt. Consultants, 306
12 F.3d at 825 (affirming denial of spoliation inference where Medical Lab had available to it other
13 evidence to challenge the claim, and failed to pursue it). Second, Tech Trans was contractually
14 obligated by its insurer to give it notice of the claim and allow it to inspect the sets, yet it did not
15 do so. That failure suggests that Tech Trans bears at least some responsibility for the fact that
16 no inspection occurred. Batcha Dep. at pp. 76-78. Finally, although the destruction of the sets
17 was not a mere accident, there is no evidence that CPCI or The Hartford destroyed the sets
18 because they believed they would be harmful to their case. See, e.g., Akiona v. United States,
19 938 F.2d 158, 161 (9th Cir. 1991) (finding that the district court erred in sanctioning a party for
20 spoliation because there was no evidence that the party destroyed the evidence “with the intent
21 of covering up information”). Instead, The Hartford salvaged the sets to mitigate its damages
22 and avoid paying expensive storage fees. Lovlien Dep. (Dkt. #33-4) at p. 39. In light of these
23 circumstances, a spoliation instruction would not serve the purposes of the inference, and it is
24 not warranted. Cf. Akiona, 938 F.2d at 161 (explaining that the inference has both an
25 evidentiary rationale and a prophylactic/punitive one).

1 **C. Statements by Third-Party Truck Drivers.**

2 Tech Trans argues that the Court should exclude as hearsay any testimony from Impart's
3 personnel or other witnesses regarding comments allegedly made by one or more of the delivery
4 truck drivers that some of the sets had been dropped during transit. The statements are hearsay;
5 CPCI argues that they are nevertheless admissible as statements against a party by its "agent or
6 servant concerning a matter within the scope of his agency or employment, made during the
7 existence of the relationship" Fed. R. Evid. 801(d)(2)(D). Although CPCI argues that the
8 drivers were employed to deliver the freight, it has offered no evidence that the delivery truck
9 drivers were employed by Tech Trans or were otherwise its agent. Accordingly, the statements
10 by the truck drivers are inadmissible hearsay.

11 **III. CONCLUSION**

12 For all of the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART
13 Tech Trans' motion *in limine* as set forth more fully above (Dkt. #35).

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15 DATED this 14th day of October, 2005.

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18 Robert S. Lasnik
19 United States District Judge
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